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JOSEPH F. SPANIOL, JR.
CLERK

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

ON PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

RESPONDENT'S BRIEF IN OPPOSITION

PROOF OF SERVICE

By: John A. Vos (P38643)
Court Appointed Attorney for Respondent
200 North Division Avenue
Grand Rapids, Michigan 49503
616/235 0134

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Elton Nash, who is now held in a Michigan State Correctional Facility, asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Michigan Court of Appeals (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 39 of the rules of this Court.

The Respondent's Affidavit in support of this motion is attached hereto.

BY: _____

JOHN A. VOS (P38643)
Court Appointed Attorney for
Respondent
200 North Division Avenue
Grand Rapids, Michigan 49503
616/235 0134

DATED: December 20, 1990

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Elton Nash, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and,

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes ____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1911, Gross Income, Approximately $600 per month

2. Have you received within the past twelve months any income from any of the following sources?

a. Business, profession or form of self-employment?

Yes ____ No X

b. Rent payments, interest or dividends?

Yes ____ No X

c. Pensions, annuities or life insurance payments?

Yes ____ No X

d. Gifts or inheritances?

Yes ____ No X

e. Any other sources?

Yes ____ No X

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes X No ____ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

[illegible] account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ____ No X

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

None

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

ELTON NASH, Respondent

Subscribed and sworn to before me
this 20th day of December, 1990.

_____, Notary Public
_____ County, Michigan
My commission expires: _____

DAVID R. KLEINHARDT, Notary Public
Ionia County, Michigan
Acting In Montcalm County
My Commission Expires 11-23-91

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IN THE

SUPREME COURT OF THE UNITED STATES

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PEOPLE OF THE STATE
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# RESPONDENT'S BRIEF IN OPPOSITION

By: John A. Vos (P38643)
Court Appointed Attorney for Respondent
200 North Divison Avenue
Grand Rapids, Michigan 49503
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## COUNTER STATEMENT OF QUESTION PRESENTED

WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY DECIDED THAT WHERE A POLICE OFFICER APPROACHES WITH HIS PATROL CAR A PEDESTRIAN WALKING DOWN THE SIDEWALK AT APPROXIMATELY 3:30 A.M., EXITS HIS PATROL CAR FULLY UNIFORMED AND ARMED WITH A REVOLVER ON HIS HIP, SHINES HIS FLASHLIGHT ON THE PEDESTRIAN, STOPS HIM, REQUESTS NOT ONE BUT TWO SOURCES OF IDENTIFICATION AND QUESTIONS HIM AS TO HIS DESTINATION AND IDENTIFICATION IN THE PRESENCE OF OTHER ASSISTING UNIFORMED OFFICERS, THE PEDESTRIAN OR INDIVIDUAL HAS BEEN "SEIZED."

## COUNTER STATEMENT OF FACTS

The instant case arises out of a September 25, 1988, incident in which an East Grand Rapids police officer stopped and questioned the Respondent, Mr. Elton Nash, upon observing the Respondent walking during the early morning hours in an area allegedly subject to many breaking and enterings. In questioning the Respondent, the officer asked the Respondent to produce identification and the contents of his back pocket. The Respondent produced, among other items, credit cards which bore the names of persons other than himself. As a result, the Respondent was charged with the Unlawful Possession of Credit Cards. Counsel was appointed by the trial court on September 12, 1989, to represent the Respondent in this prosecutorial appeal.

At the October 6, 1988, preliminary examination, police officer Michael R. Ellis testified that on September 25, 1988, he was on duty patrolling an area in which there had recently been a rash of breaking and enterings (preliminary examination transcript [hereinafter "PT"], p. 4). At approximately 3:30 a.m., Officer Ellis noticed a black subject walking eastbound on the north side of the street he was patrolling (PT, p. 5). Officer Ellis stopped and exited his car, greeted the black subject, and asked him what he was doing out at this time of the morning (PT, p. 5). After the black subject informed Officer Ellis that he was just out for a walk, Officer Ellis asked the subject for identification, and the subject produced for the officer parole papers bearing the Respondent's name, Elton Nash (PT, p. 5). Officer Ellis smelled

alcohol on the Respondent's breath and noted that the parole papers indicated that abstention from alcohol consumption was a condition of the Respondent's parole (PT, pp. 5-6) At the officer's request, the Respondent explained that he had come from Metropolitan Hospital and was on his way home (PT, p. 6). The officer noted that the Respondent was walking in what appeared to be the wrong direction to have been coming from the hospital (PT, p. 6). At this time, a second officer, Lieutenant Bowman, pulled alongside Officer Ellis and the Respondent and, while the Respondent was made to wait nearby, Lieutenant Bowman informed Officer Ellis that the Respondent had been a suspect in an incident the night before at another hospital in which a diamond ring was taken from the Respondent's person (PT, pp. 6-7). A third patrol car occupied by Officer Gingerich also pulled up shortly after Lieutenant Bowman (PT, p. 8). Officer Gingerich then confirmed that the information provided by the Respondent as to whom he had been visiting at the hospital did not match information provided by Metropolitan Hospital (PT, p. 8).

Officer Ellis then asked the Respondent for additional identification and the Respondent replied he had no further identification (PT, p. 9). Noting a bulge in the Respondent's back pocket, Officer Ellis asked the Respondent if he would mind emptying the contents of his pockets onto the hood of the patrol car (PT, p. 9). Respondent apparently said he did not mind and complied (PT, p. 9). In examining the items produced by the Respondent, Officer Ellis discovered credit cards containing the

names of persons other than the Respondent (PT, pp. 10-11).

On cross-examination, Officer Ellis testified he had not, on the evening in question and just prior to stopping the Respondent, received any particular reports of ongoing or recent criminal activity in this particular area (PT, p. 11). He testified that prior to the stop he did not see the Respondent engaging in any fertive or threatening gestures, did not see any weapons in the Respondent's possession, and was not investigating any credit card thefts (PT, p. 12). Officer Ellis simply believed the Respondent looked suspicious (PT, p. 12). He stated further that he asked for more identification because he was "just interested in further identification." (PT, p. 13). He testified that he had detained the Respondent for approximately two to three minutes before Lieutenant Bowman arrived in a second patrol car (PT, p. 13).

Near conclusion of the preliminary examination, the Respondent moved to have the charges dismissed, arguing that he was unlawfully detained and that therefore any evidence collected against him must be suppressed. The District Court Judge denied the motion without explanation and bound the Defendant over to stand trial (PT, pp. 20-21).

On February 6, 1989, the Respondent filed in the trial Court a Motion to Suppress and Brief in Support arguing that the initial stop of the Respondent was invalid, and, alternatively, that even if the initial stop was valid, the Respondent was unlawfully detained beyond the scope of the stop based on the

reason given for the stop. At the February 7, 1989, motion hearing, Officer Ellis testified that the area wherein the Respondent was stopped had experienced recently a large number of breaking and enterings for which there were no leads as of the date he stopped the Respondent. (motion hearing transcript [hereinafter "MT"], p. 5) He testified that "the reason the Respondent was stopped at that particular time was because it was 3:30 in the morning. It was between the times that breaking and enterings had occurred on a regular basis..." and that this was in keeping with his assignment to patrol that area heavily and stop and investigate anything out of the ordinary (MT, p. 6). He testified on direct examination that he stopped and greeted the Respondent and asked him what he was doing in the area at that particular time and where he had come from (MT, pp. 10-11). After the Respondent told him that he was coming from Metropolitan Hospital, the officer noted to himself that the Respondent was in fact walking toward the hospital, Officer Ellis allegedly asked the Respondent for identification (MT, p. 12). On cross examination, however, Officer Ellis said that he asked the Respondent for identification after he had greeted the Respondent, and that after requesting identification, he asked the Respondent why he was in that particular area (MT, pp. 22-25).

In response to Officer Ellis' request for identification, the Respondent produced parole papers with parole conditions that included that the Respondent not consume alcholic beverages (MT, p. 12). Officer Ellis smelled alcohol on the

Respondent's breath (MT, p. 12). While Officer Ellis was reading the parole papers, Lieutenant Bowman pulled up in a second cruiser (MT, p. 13). Officer Ellis then went to speak with Lieutenant Bowman and handed the parole papers to Lieutenant Bowman who recognized the Respondent's name and provided Officer Ellis with further information regarding the Respondent (MT, p. 13). After receiving information from Lieutenant Bowman, Officer Ellis asked the Respondent for further identification (MT, p. 14). When the Respondent indicated that he had no other identification, Officer Ellis shined his flashlight on the respondent's back pocket, noticed a bulge, and asked the Respondent if he would mind emptying the contents of his pocket on the hood of the patrol car (MT, p. 14). Officer Ellis then discovered the credit cards that later formed the basis for the charge (MT, pp. 16-17). Officer Ellis indicated that on the night in question, he never arrested the Respondent (MT, p. 19).

On cross-examination, Officer Ellis confirmed that the Respondent was simply walking down the street just prior to the stop (MT, p. 23). He confirmed that he greeted the Respondent and then asked for identification (MT, p. 22-25). He also confirmed that the parole papers did in fact have on it a picture of the Respondent (MT, p. 25). While Officer Ellis was looking a the parole papers, Lieutenant Bowman pulled alongside of Officer Ellis and the Respondent (MT, pp. 25-26). At this point, the Respondent was not as of yet a suspect in any crime nor under arrest (MT, pp. 26-27). Officer Ellis confirmed that he was shining his

flashlight on or at the Respondent while questioning him, and that he had a revolver on his hip (MT, p. 28). Prior to leaving the Respondent, there were a total of three patrol cars alongside of the Respondent (MT, p. 29).

The trial court granted the Respondent's Motion to Suppress, holding that the initial stop was indeed invalid since it was not based upon any specific complaints of criminal activity involving the Respondent. The trial judge found further that the Respondent could reasonably believe he was not free to leave and that there was therefore an unlawful detention of the Respondent as well. The trial court then dismissed the charges against the Respondent.

The Petitioner subsequently filed a Motion for Rehearing, which rehearing was held on March 17, 1989. At this hearing, the trial court clarified that while the initial encounter may have been lawful, this encounter developed into an unlawful detention. The Respondent's Motion for Suppression of the credit cards and dismissal of the charges was therefore affirmed.

The Petitioner then appealed to the Michigan Court of Appeals arguing that the trial court erred in finding that the Respondent had been "seized." In an unpublished March 16, 1990, per curiam opinion, the Court of Appeals affirmed the trial court's order suppressing the credit cards and dismissing the charges.

On April 3, 1990, the Petitioner moved for Rehearing in

the Michigan Court of Appeals. The Michigan Court of Appeals denied the Petitioner's Motion for Rehearing on May 17, 1990. On May 23, 1990, the Petitioner filed with the Michigan Supreme Court an Application for Leave to Appeal. In an August 28, 1990, Order, the Michigan Supreme Court denied the Petitioner's Application for Leave to Appeal.

## LAW AND ARGUMENT

## REASONS FOR DENYING THE WRIT

I. THE MICHIGAN COURT OF APPEALS CORRECTLY DECIDED THAT WHERE A POLICE OFFICER APPROACHES WITH HIS PATROL CAR A PEDESTRIAN WALKING DOWN THE SIDEWALK AT APPROXIMATELY 3:30 A.M., EXITS HIS PATROL CAR FULLY UNIFORMED AND ARMED WITH A REVOLVER ON HIS HIP, SHINES HIS FLASHLIGHT ON THE PEDESTRIAN, STOPS HIM, REQUESTS NOT ONE BUT TWO SOURCES OF IDENTIFICATION AND QUESTIONS HIM AS TO HIS DESTINATION AND IDENTIFICATION IN THE PRESENCE OF OTHER ASSISTING UNIFORMED OFFICERS, THE PEDESTRIAN OR INDIVIDUAL HAS BEEN "SEIZED."

Respondent submits that the facts of the instant case, contrary to what the Petitioner contends, are not unique and do not raise any Fourth Amendment question left unanswered by this Court or Michigan State Courts. In fact, this Court's decision in *Michigan v Chesternut*, 486 U.S. 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988), *Florida v Royer*, 460 U.S. 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983), and other clarifying Federal and Michigan State Court decisions adequately provided the Michigan Trial and Appellate Courts with the ability to correctly decide that where

a police officer drives up next to a pedestrian walking down the sidewalk at approximately 3:30 a.m., exits his patrol car fully uniformed and armed with a revolver on his hip, shines a flashlight on the pedestrian, stops him, requests not one but two sources of identification, and questions him as to his destination and identification in the presence of other assisting uniformed officers, the pedestrian or individual has been "seized." There are no special and important reasons for this Court to exercise its judicial discretion and grant the petitioner's petition for a writ of certiorari or other plenary review in this case.

The Petitioner is arguing that the evidence suppressed by the trial Court and found properly suppressed by the Michigan Court of Appeals was discovered not as a result of a lawful *Terry* stop, see *Terry v Ohio*, 392 U.S. 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), but rather, a first-tier police-citizen encounter described by this Court in *Florida v Royer, supra*, and that the respondent was therefore never "seized" within this Court's legal definition of "seizure" and that the evidence should therefore not have been suppressed. Essentially, the Petitioner contends that the Respondent willingly and without hesitation engaged in a conversation with the police officer, and divulged or disclosed incriminating evidence to the officer, even though he knew or should have known that he was free to go and free to end the conversation at any time. Respondent submits now on the contrary, as the Michigan Trial Court found and Michigan Court of Appeals affirmed, under the circumstances the Respondent was in fact

seized and seized unlawfully.

At the initial suppression hearing, the trial court appeared to indicate that there was no basis for a *Terry* stop because the officer had no specific reports of any criminal activity afoot that might involve the Respondent. The trial court held that the officer therefore lacked any reasonable suspicion to believe the Respondent was engaged or had engaged in criminal conduct, citing *Brown v Texas*, 443 U.S. 47; 61 L Ed 2d 357; 99 S Ct 2637 (1979). Although the trial court did not use the term "seize", it had little difficulty finding that the Respondent was "stopped" and "detained" and that someone in his position could reasonably have believed he was not free to go, and therefore the officer was required to be armed with the "reasonable suspicion" required under *Brown, supra*. On Rehearing, the trial court remained convinced that there was no basis for a *Terry* stop, and remained convinced that the officer's conduct amounted to a "stop." The trial court however elaborated further, indicating exactly when the encounter with the Respondent developed into an unlawful "seizure". The trial court found that the officer's request for identification coupled with the finding that the Respondent could reasonably believe that he was not free to go amounted to an unlawful "seizure". Respondent submits that the trial court was correct in finding that a seizure had in fact occurred. Moreover, the Respondent submits that he was "seized" even before the officer asked for his identification.

As the Petitioner explains, the Supreme Court in *Florida*

*v Royer, supra*, divided police-citizen encounters into three categories or tiers, an analysis that was approved by the Michigan Supreme Court in *People v Shabaz*, 424 Mich 442; 378 NW 2d 451 (1985). The first tier consists of mere communication which involves no element of detention or coercion, e.g., an officer asking a person questions in a public place. *Shabaz, supra*, Page 56. There is no requirement of reasonable suspicion or probable cause for this type of encounter. If an officer merely approaches an individual on the street or in a public place, and asks the individual if he is willing to answer questions, and the individual volunteers answers, such answers may be used against him. *Royer*, 460 U.S. 491. It is this category or tier into which the Petitioner seeks to cast the encounter in the instant case between the Respondent and the police officer. Respondent disagrees.

This Court in *Michigan v Chesternut, supra*, reiterated its directive that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all the circumstances surrounding the incident in each individual case, and the police can be said to have seized an individual only if, in view of all the circumstances surrounding, a reasonable person would have believed he was not free to leave:

> "The test is necessarily imprecise, because of its design to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to

> conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (100 L Ed 2d 572)

In *Chesternut*, the respondent, after observing a patrol car nearing the corner where he stood, turned and began to run. The patrol car followed the respondent "to see where he was going." As the patrol car drove alongside the respondent for a short distance, the respondent dropped a number of packets containing codeine. The respondent stopped and was arrested and charged with possession of narcotics. The presiding Magistrate dismissed the charges at the preliminary hearing holding that the police chase could not be justified on the mere fact that the suspect ran at the site of the police. The trial Court upheld the dismissal, the Michigan Court of Appeals affirmed, and Michigan Supreme Court denied leave to appeal. The United States Supreme Court found that the respondent was not seized by the police before he discarded the packets containing the narcotics, stating that:

> "Without more, the police conduct here--a brief acceleration to catch up with the respondent, followed by a short drive alongside him--was not "so intimidating" that the respondent could reasonably have believed that he was not free to disregard the police presence and go about his business." (100 L Ed 2d 523)

As is clear from the Court's statements in *Chesternut*, all of the circumstances, including the setting, police conduct

etc., must be considered in deciding whether a reasonable person would have believed he was not free to leave. Respondent submits that the instant case involves much more police conduct than in *Chesternut*. In the instant case, the officer approached the Respondent first by driving his vehicle up to the Respondent and at 3:30 a.m. exited his patrol car armed and in uniform and walked up to the Respondent shining a flashlight at Respondent. The officer greeted Respondent, asked him what he was doing out at 3:30 a.m., and then requested identification from the Respondent (P.T., Page 5; M.T., Pages 22-24). The Respondent then handed his parole papers to the officer in an effort to produce identification. Before long, two more officers and two more patrol cruisers arrived at the scene. At no time did the officer inform the Respondent that he was free to leave or end the conversation or inquiry. At no time did the officer ever ask the Respondent if he would mind answering some questions. Additionally, the officer retained the Respondent's parole papers throughout the encounter. As the trial Court Judge stated in the instant case:

> "[Respondent] was in a situation where a person in obvious authority, a uniformed officer armed and with flashlights and ultimately re-enforced by two other uniformed officers, certainly created an on-the-street police dominated atmosphere in which it seems to the Court, there would be a reasonable question in the Defendant's mind as to whether his freedom of movement was being significantly interfered with by authorities.

> Still, while he was not placed under arrest by the exercise of any magical words by the police and was not handcuffed or put into a cruiser and, indeed, was ultimately released, it seems to the Court that there is a reasonable basis for the Defendant to believe at the time of these inquiries by one, then two, then three officers, that he, indeed, was detained by police on the street and was not free to go even though, as Officer Ellis tells us, he certainly was." (M.T., Page 43)

Additionally, it should be noted that the officer himself labeled and referred to his encounter with the Respondent as a "stop" (M.T., Page 6). In view of the circumstances, it is correct to say that from the outset of the encounter or stop, the Respondent could reasonable have believed he was not free to "disregard the police presence and go about his own business." Even assuming the encounter began as a first-tier encounter, the encounter transformed into the stop-and-identify detentioner situation held unconstitutional in *Kolender v Lawson*, 461 U.S. 352; 103 S Ct 1855; 75 L Ed 2d 903 (1983).

The Petitioner cites *U.S. v Mendenhall*, 446 U.S. 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980), in support of its contention that the encounter in the instant case was a first-tier encounter. However, just as this Court in *Royer, supra*, distinguished *Royer* from *Mendenhall*, 460 U.S. 504 fn. 9, the instant case is likewise distinguishable for some of the same reasons. In *Mendenhall*, the setting was entirely different. The respondent was walking in an airport concourse with other people. The respondent's ticket and

identification were immediately returned to her and the officers were careful to advise her that she could lawfully decline the search. Along this line, the Respondent notes that this Court in *Royer* mentioned that by "informing [*Royer*] that she was free to go if she so desired, the officers might have avoided any claim that the encounter was anything but a consensual matter from start to finish." (460 U.S. 504). Additionally, this Court in *Mendenhall* noted that the agents in that case wore no uniforms and displayed no weapons. This Court further stated that:

> "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." (446 U.S. 554) (Emphasis added)

The coercive effects or atmosphere is much more apparent in the instant case.

The facts in *Mendenhall* involve an airport stop as do the facts in *United States v Lehman*, 798 F 2d 692 (CA 4, 1986), another case cited by the Petitioner in his Petition and Brief to this Court, which stops are often addressed differently by the Courts and present a setting in which one would be less likely to believe, if approached by an uniformed officer, that he or she was not free to go, than if approached at 3:30 a.m. by a uniformed and armed police officer who had just pulled up in a patrol car and exited with a flashlight shining on the individual approached.

Additionally, the Courts have recognized the need for voluntary police-citizen encounters, particularly in airports, in order to enforce laws aimed at curbing drug use. *United States v $73,277.00 United States Currency*, 710 F 2d 283 (CA 7, 1983).

The facts in *U.S. v Maragh*, 894 F 2d 415 (D.C. Cir., 1990), another case cited by the Petitioner, also involved a stop by plainclothes drug interdiction police officers at a train depot at approximately 4:00 p.m. resulting in the finding of illegal drugs. It is interesting to note that the Court in *Maragh* stated that in order to properly determine whether police have seized a citizen the Court will look to such factors as "whether the officers displayed weapons, were physically intimidating or threatening, or approached the citizen at an unusual place or time." (894 F 2d 418). In the instant case, there exists the factors of visible weapons and an unusual time. See also *U.S. v Brady*, 842 F 2d 1313, 1314 (D.C. Cir., 1988). Respondent also notes that the United States Court of Appeals in *Gomez v Turner*, 672 F 2d 134 (D.C. Cir., 1982), another case cited by the Petitioner, stated in a footnote "That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others." (672 F 2d 143, 144, fn 18).

Respondent finds instructive two United States District Court cases on the issue of whether and when a seizure occurs. In *U.S. v Price*, 680 F Supp 833 (N.D. Tex., 1988) the Court found that what began as a permissible contact escalated into a seizure

when the officer identified himself as a narcotics agent and asked the defendant if the officer could retrieve and search the defendant's baggage. The Court noted that no seizure occurred when the officers initially approached the defendant since the officer asked to speak with the defendant and the defendant agreed. The Court also indicated other factors that would strongly suggest a seizure, namely (1) that identification was retained by the officers, (2) that defendant was not capable in light of his education or intelligence, of "knowing consent," and (3) that defendant was never told that he could decline to speak with the officers or refuse to consent to their request. The Court stated that *U.S. v Mendenhall, supra*, held that whether the defendant was ever told he could decline to speak with the officers or refuse to consent to their request is highly relevant to the determination that any consent was proffered voluntarily. Respondent submits that analyzing the instant case in light of the factors found significant by both the U.S. Supreme Court and Federal District Court, it is clear that the Respondent was "seized" even before he was asked for identification. Any doubt as to whether he was seized or not is eliminated when the officer asked to examine the contents of his back pocket and wallet.

In *U.S. v Schumaker*, 577 F Supp 590 (1983), the Court found that a D.E.A. agent and accompanying officers did not violate the Fourth Amendment when they approached the defendant and questioned him. The Court found significant the fact that the officers were dressed casually and not in uniform, that the

defendant's identification was not retained by the agent or officers, that the D.E.A. agent informed the defendant upon approaching him that he did not have to speak with the officers, and that the defendant was approached in a well-lit spacious public airport concourse where other people could be seen walking about.

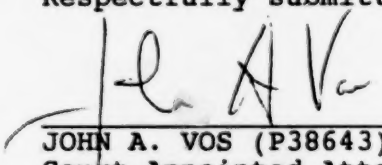
Respondent submits that it is clear that he was "seized" in his encounter with the officer, and would contend that this "seizure" occurred even prior to the request for identification in light of all the circumstances surrounding the incident. The officer undoubtedly could have informed the Respondent that he was not required to answer questions or comply with his request. While the officers commitment to curb the number of breaking and enterings in the area is admirable, Respondent submits that this societal interest in law enforcement must yield to a more compelling interest, namely, a citizen's constitutionally protected interest in privacy. Under the facts in the instant case, a reasonable man travelling down the sidewalk after dark and approached and questioned in the manner in which the Respondent was by the officer in the instant case would not have felt that he was "free to leave" or "free to disregard the questions and walk away." *Mendenhall*, 446 U.S. 554. Respondent submits that the instant case presents exactly the type of random patrol or arbitrary interference and detention the Fourth Amendment was meant to protect against.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari and other relief requested by the Petitioner in his Petition and Brief.

DATED: December 21, 1990

Respectfully submitted,



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Grand Rapids, Michigan 49503
616/235 0134

No. 90-817

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * *

PEOPLE OF THE STATE
OF MICHIGAN,

Petitioner,

-vs-

ELTON NASH,

Respondent.
_____/

PROOF OF SERVICE

STATE OF MICHIGAN )
) ss.
COUNTY OF KENT )

JOHN A. VOS, first being duly sworn, deposes and says that on the 21st day of December, 1990, he served to the Clerk of this Court by first-class mail, postage prepaid, and bearing a post mark showing that the document was mailed on or before the last day for filing pursuant to Rule 29 of the rules of the United States Supreme Court the following:

On Petition for Writ of Certiorari to the Michigan Court of Appeals, Motion for Leave to Proceed in Forma Pauperis, Affidavit, Respondent's Brief on Opposition, Proof of Service

and he mailed one copy of same to:

Kent County Prosecutor
416 Hall of Justice
333 Monroe Avenue, N.E.
Grand Rapids, Michigan 49503

Attorney General
Law Building
525 West Ottawa
Lansing, Michigan 48913

JOHN A. VOS

Subscribed and sworn to before me
this 21st day of December, 1990.

Melinda Zoerman

Melinda Zoerman, Notary Public
Kent County, Michigan
My commission expires: 5-17-94

JOHN A. VOS
Attorney at Law
200 NORTH DIVISION AVENUE
GRAND RAPIDS, MICHIGAN 49503
TELEPHONE: (616) 235-0134

December 20, 1990

United States Supreme Court
Clerk of the Court
Washington, D.C. 20543

RE: PEOPLE OF THE STATE OF MICHIGAN v ELTON NASH
Trial Court No: 88-46078-FH
Michigan Court of Appeals No: 117233
Supreme Court Case No: 89-139
United States Supreme Court Case No: 90-817

Dear Clerk:

Enclosed for filing please an original and eleven (11) copies of a Motion for Leave to Proceed in Forma Pauperis, Affidavit, Defendant's Brief in Opposition and Proof of Service in connection with the above-referenced matter.

Thank you for your attention to this matter. Should you have any questions or concerns, please do not hesitate to call.

Sincerely,

John A. Vos

JAV:mjz

Enclosures

cc: Attorney General
Kent County Prosecutor
Mr. Elton Nash
File

RECEIVED
DEC 26 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

90-817

IN THE

SUPREME COURT OF THE UNITED STATES

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NOV 2 3 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

ELTON NASH,

Respondent.

PROOF OF SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN )
)
County of Kent )

Carol J Bamford, being first duly sworn, deposes and says that on the 21st day of November, 1990, she served a copy of the above captioned cause upon John Vos by regular mail, by then and there placing the same in an envelope, postage prepaid, properly addressed:

John Vos
Attorney at Law
200 N. Division
Grand Rapids, MI 49503

and placing the same in the United States Post Office at Grand Rapids, Michigan.

Carol J. Bamford

Subscribed and sworn to before me this 21st day of November 1990.

Nadine Y. Mueller
Notary Public, Kent County, MI
My commission expires: Jan. 8, 1991